IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE	)	
	)	**NO. 91-15546**
JOHN HICKS OLDSMOBILE-GMC TRUCK, INC.	)	
	)	**Chapter 7**
Debtor	)	
JERRY FARINASH, TRUSTEE	)	
	)	
Plaintiff	)	
	)	
v.	)	**ADV. NO. 93-1154**
	)	
AMSOUTH BANK OF TENNESSEE, as Successor-in-Interest to First Federal Savings and Loan Association of Chattanooga	)	
	)	
Defendant	)	

[ENTERED: 4-28-94]

M E M O R A N D U M

This adversary proceeding to avoid an alleged preference is before the court on motion for summary judgment filed by the defendant, AmSouth Bank of Tennessee ("AmSouth"), a creditor in the Chapter 7 case. For the reasons that follow, the motion for summary judgment will be denied.

I.

Defendant's predecessor, First Federal Savings & Loan Association of Chattanooga ("First Federal"), made several loans to the debtor, John Hicks Oldsmobile-GMC Truck, Inc., such that the debtor owed defendant $4,695,632.20 on January 15, 1991. Thereafter, debtor made note payments amounting to $543,906.40, all within the

one-year period immediately preceding the filing of the debtor's Chapter 11 petition.[1] On October 2, 1991, after the payments were credited, debtor owed an outstanding balance of $4,574,956.23, and on November 21, 1991, debtor filed its petition for relief under Chapter 11.

In consideration of the loans made to it, the debtor granted First Federal a security interest in its main business property comprising about twenty-one acres of land improved by the show-rooms, offices, and maintenance facilities necessary to a modern automobile dealership. At the instance of First Federal, William Latimore, an experienced real estate appraiser, appraised the property subject to the defendant's security interest and gave his opinion that it had the probable market value of $6 million on December 3, 1990. It was his further opinion that, under the then-extant economic conditions he described as "poor," the property could be sold at a distress sale for a price between $2,400,000 and $3 million. Its sale price would decline even further to $2 million if the property had to be sold within three months.

In support of its motion for summary judgment, First Federal filed an affidavit by Mr. Latimore dated November 8, 1993, to the effect that the fair market value of the collateral in this case was at least $4,700,000 throughout the period beginning in January 1991 and ending with the filing of the petition on November 21,

[1] The case was later converted to a Chapter 7.

1991, that is, the period during which the allegedly preferential payments were made.

In response, the trustee has filed an affidavit by Eugene Bowman, an experienced real estate appraiser, in which Mr. Bowman gives his opinion that, during the period from January, 1991, through November, 1991, the value of the property in question never exceeded $3,950,000. In its schedules, the debtor valued this collateral at $5 million.

II.

Federal Rule of Civil Procedure 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The mere existence of *some* alleged factual dispute between the parties will not prevent the granting of summary judgment as long as there is no genuine issue of material fact to be decided in the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). However, "if the evidence is such that a reasonable [fact-finder] could return a verdict for the nonmoving party," then summary judgment will not lie. *Id*. at 248. On motion for summary judgment, the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes,

the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Company,* 398 U.S. 144, 157 (1970).

Under 11 U.S.C. § 547(b)(5)(A), a creditor receives a preference only if, among other things, it receives a transfer that enables it to receive more than it would receive if the case were a case under Chapter 7 of the Bankruptcy Code. The defendant argues that its appraisal of the collateral at a figure in excess of $4,700,000 proves that the collateral had a value in excess of the defendant's claim on November 21, 1991, the date the petition was filed. If the defendant were thus fully secured, the payments made to it between January and November of 1991 would not be considered preferential under 11 U.S.C. § 547(b)(5)(A). "Payments to a creditor who is fully secured are not preferential since the creditor would receive payment up to the full value of his collateral in a Chapter 7 liquidation." *Ray v. City Bank & Trust Company (In re C-L Cartage Co.),* 899 F.2d 1490, 1493 (6th Cir. 1990); *accord Lill v. Bricker (In re Lill),* 116 B.R. 543, 549 (Bankr. N.D. Ohio 1990); *Flynn v. MidAmerica Bank & Trust Co. (In re Joe Flynn Rare Coins, Inc.),* 81 B.R. 1009, 1019 (Bankr. D. Kan. 1988).

AmSouth cannot prevail on motion for summary judgment, however, because the affidavit of Mr. Bowman disputes the value of AmSouth's collateral, giving it a value below that of AmSouth's claim at all times during the preference period in this case. If that is so, then AmSouth's predecessor, First Federal, was not

fully secured on the date of the petition, and the trustee may be able to establish a series of preferential payments at trial. The existence of this genuine issue of material fact concerning the value[2] of the collateral in this case precludes summary judgment for the defendant.

An appropriate order will enter.

JOHN C. COOK
UNITED STATES BANKRUPTCY JUDGE

[2] Valuation of real estate for purposes of the "more than" test under § 547(b)(5)(A) is a subject to which little judicial attention seems to have been given. Should the value used be the property's fair market value at its highest and best use, its distress sale value in the hands of the creditor, or some other value? In a somewhat similar situation involving a hypothetical Chapter 7 liq- uidation, courts have held that valuation for purposes of the "best interests test" of § 1129(a)(7) should be the value of the debtor's assets in an "orderly liquidation." *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 292-93 (Bankr. S.D.N.Y. 1990).